

2003

# Sindy Holmstead v. Tony D. Holmstead : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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**Paulette Slagg**  
**Clerk of the Court**

IN THE UTAH COURT OF APPEALS

SINDY HOLMSTEAD,	)	Case No. 20030248-CA
	)	
Appellee,	)	BRIEF OF APPELLEE
	)	
vs.	)	
	)	
TONY D. HOLMSTEAD,	)	
	)	
Appellant	)	

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APPEAL FROM SIXTH DISTRICT COURT, SEVIER COUNTY, UTAH

JUDGE PAUL D. LYMAN

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## **JURISDICTION**

This appeal arises out of a divorce case and involves questions of alimony, property settlements, and an award of attorney fees. The Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3(2)(h) of the Utah Code.

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

- I. Did Appellant Tony Holmstead properly marshal the facts supporting the trial courts decisions in order to attack them on appeal?
- II. Did the trial court abuse its discretion when it divided marital property equitably rather than apply rigid mathematical formulas without regard to the circumstances of the case?

- III. Appellant Tony Holmstead claims as a reasonable monthly expense (which he allegedly cannot reduce, prepay, or refinance) a loan payment which allegedly has an interest rate over 400%. He therefore asserts he cannot pay alimony or attorney fees awarded to his former wife, Sindy Holmstead. Did the trial court abuse its discretion when it ordered Tony Holmstead to reduce and refinance this expense and calculated alimony and attorneys fees assuming this reduction in expenses?
- IV. Should Petitioner/Appellee be awarded attorneys fees on appeal?
- V. The standard of review in this case is whether the trial court committed an abuse of discretion, Shinokoskey v. Shinokoskey, 2001 UT App. 44, ¶ 5, 19 P.3d 1005, 1007; and correction of clearly erroneous error with regards to finding of facts, Elman v. Elman, 2002 UT App. 83, ¶ 17, 45 P.3d 176, 180; Utah R.Civ.P. 52(a); Kessimakis v. Kessimakis, 1999 UT App 130, ¶ 8, 977 P.2d 1226. Although Appellant Tony Holmsteads brief did not show these issues were preserved at the trial level, they were preserved with Respondent/Appellants Tony Holmsteads post-trial Motion to Alter or Amend Divorce Decree.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

Utah Code Annotated Sections 30-3-3 and 30-3-5(7). Both may be found in the Addendum.



## **STATEMENT OF THE CASE**

1. This appeal concerns a divorce and property divisions, alimony, and attorney fees related to that divorce, but no child support or custody issues. Cindy Holmstead became Tony Holmsteads wife on November 27, 1976. The marriage was a long term one of thirty years, but eventually Cindy Holmstead filed a Petition for Divorce on January 28, 2002 in the Sixth Judicial District Court of Sevier County.

2. While both parties agreed a divorce was necessary, a bench trial was held on November 7, 2002 before Judge Paul D. Lyman. This trial allowed Judge Lyman to equitably divide the marital property and award alimony and enter his Findings of facts, Conclusions of Law, and a Decree of Divorce on January 6, 2003, retroactively effective on the date of the trial.

3. After analysis of the parties financial conditions, the trial court awarded Cindy Holmstead the family house and her failing business, an amount of monthly alimony, and attorneys fees in the amount of \$3,500.00. The trial court awarded Tony Holmstead a greater amount of his retirement plan as his portion of the marital home. Other awards and findings of the trial court (aside from attorney fees) are not at issue in this appeal.

4. Tony Holmstead filed a Motion to Alter or Amend Decree of Divorce on January 10, 2003. An Order denying this motion was entered on January 29, 2003, and is the final order in this case and the one appealed from.

5. Tony Holmstead filed a Notice of Appeal February 24, 2003 from the final order denying his Motion to Alter or Amend entered by the trial court. Tony Holmstead is the Respondent/Appellant in this case. Cindy Holmstead is the Petitioner/Appellee.

6. Respondent/Appellant Tony Holmstead is asking this Court to reverse the trial court on three aspects of its decision, and remand back to the trial court for correction of what he argues is the trial courts abuse of discretion. Specifically, Appellant Tony Holmstead argues that the trial court abused its discretion in its division of marital property, award of alimony, and award of attorney's fees.

7. Petitioner/Appellee Cindy Holmstead, the former wife of Appellant Tony Holmstead, is asking this Court to sustain the trial court's rulings and award her attorney's fees on appeal.

### **STATEMENT OF THE FACTS**

1. Cindy Holmstead and Tony Holmstead were married for slightly over thirty years. (Findings of Fact (hereinafter Find. Fact.), ¶ 2). They were divorced on November 7, 2002 by court decree. Tony and Cindy had three children together, (Trial Tr. 35), all of whom had reached majority at the time of the divorce. (Find. Fact. ¶ 5).

### **Reasons For Divorce**

2. Towards the end of the marriage, Tony Holmstead became addicted to painkillers. (Trial Tr. 37-38). This problem became so severe that he underwent unsuccessful treatment in a rehab center (Trial Tr. 38).

3. Tony and Cindy separated about two years before the divorce became final. (Trial Tr. 36). The reason for this separation was that Tony Holmstead had been having an affair with someone, and Cindy caught him emailing to his girlfriend. (Id.; Find. Fact. ¶ 3).

4. Since their separation, Tony Holmstead had been harassing his wife to such an extent that part of the divorce decree involved a restraining order placed on Tony Holmstead. (Divorce Decree ¶ 2).

### **Her Business And The Marital Home**

5. Cindy Holmstead owns a haircutting business, which the trial court found to be of no value and awarded to her. (Find. Fact. ¶ 7). The businesses losses clearly exceeded the value of any assets. (Id.). She did have \$7,559 in her business checking account at the time of the divorce, (Find. Fact. ¶ 9(d)), but the trial court specifically found that this fluctuating amount of money was used for ongoing business expenses such as income and social security taxes and supplies. (Id.).

6. Tony and Cindy owned a marital home with a value of \$101,500, after a home equity loan had been paid off. (Find. Fact. ¶ 6). Each party had \$50,750 in equity in the home. (Find. Fact. ¶ 21(a)).

### **The Retirement Account**

7. Tony Holmstead had a 401-K account with slightly over \$80,000 at the time of trial. (Appellants Adden. "H"; Trial Exhibit 28). A loan had been taken on this 401-K account, and the 401-K account was owed \$19,241.26 on September 30, 2002. (Id.) On July 01, 2002 the outstanding balance on the loan was \$20,566.78. (Id.) Therefore, in

about three months time the loan had been paid down by \$1,325.52, or by 6.4 % of the then total balance of the loan. (Id.).

8. Tony Holmstead testified at trial that he must make a monthly payment of \$618 on this loan from the 401-K account. (Trial Tr. 139-140; Appellant Adden. Exhibit “F”).

However, the trial court felt that the evidence showed the actual required payment amount was much less than \$618, and more likely \$308 per month. (Trial Tr. 217). Tony Holmstead testified that he cannot adjust the monthly amount paid each month, and that he cannot refinance the loan with another loan from a different source, and that he cannot prepay the loan. (Id.). Respondent/Appellant Tony Holmstead testified that if he treated the loan as a withdrawal from his 401-K plan then he could face penalties and taxes of around 25%. (Trial Tr. 138).

9. The trial court found that this monthly loan payment of \$618 was “clearly excessive and unreasonable.” (Find. Fact. ¶ 26). The court ordered the Respondent/Appellant Tony Holmstead to work and reduce the monthly payment, with a suggested amount of \$120 as being a reasonable expense. (Id.) The trial court awarded the marital home to Sindy Holmstead. (Divorce Decree, ¶ 13) Tony Holmstead was awarded the first \$50,750 of his 401-K as his portion of the home equity, plus an extra amount to compensate for assuming the entire amount of the 401-K loan. (Divorce Decree, ¶ 14(a)).

### **Income, Expenses, And \$720 Monthly Alimony To Sindy Holmstead**

10. Petitioner/Appellee Sindy Holmstead has a monthly income \$1,100 and monthly expenses of \$2,092. (Find. Fact. ¶ 24). The Court further found that she needs at least \$992 a month extra to maintain the same standard of living as she enjoyed during marriage. (Id.).

11. Respondent/Appellant Tony Holmstead has a monthly income after taxes of \$3,631. (Find. Fact. ¶ 26) The learned trial judge found that he had reasonable monthly expenses of \$2,911, after reducing the 401-K loan payment and disallowing another expense. (Find. Fact. ¶ 28). These expenses included payments on over \$41,000 of separate credit card debt he had amassed since the separation. (Trial Tr. 168) The trial court awarded the difference between his income and reasonable expenses as alimony, or \$720 monthly, which is not enough to meet Sindy Holmsteads needs. (Find. Fact. ¶ 28.)

### **Appellant Tony Holmsteads Attempts To Avoid Alimony**

12. The trial court specifically found that Tony Holmstead had deliberately accumulated at least one significant expense, payments on a new truck, in an attempt to avoid paying alimony. (Find. Fact. ¶¶ 18, 26; Addendum., Denial of Respondents Motion to Alter or Amend Judgment).

13. The trial court awarded Sindy Holmstead attorney's fees in the amount of \$3,500; taking into account her prior payment of \$1,500 towards the total due of \$4,500. (Find. Fact. ¶ 32).

## **SUMMARY OF ARGUMENT**

Appellant Tony Holmstead is attempting to reargue in this Court the same arguments and evidence that he lost on in the trial court below. He argues that the trial courts division of the marital property should be equalized instead of equitable and that he does not have the ability to pay alimony and attorneys fees.

### **1) Appellant Tony Holmstead Has Failed To Marshal The Evidence**

In order for trial courts findings of fact to be challenged, the challenger must marshal the facts supporting the trial courts decision and then show that the trial courts reasoning is against the clear weight of the evidence. Tony Holmstead has failed to do this on any of the issues on appeal and thus his appeal should be dismissed.

### **2) The Trial Court Properly Divided Marital Property Equitably Rather Than “Equalize” It.**

Appellant Tony Holmstead argues that all marital property should be divided equally rather than equitably, and that the trial court abused its discretion when it was equitable rather than equal. Trial courts do not consider property divisions in a vacuum; instead they consider other factors such income disparities and the amount of alimony. In this case, the trial court properly considered both of these factors in deciding how the marital home and retirement plans should be split.

With regards to Sindy Holmsteads business, “equalizing it” as Tony Holmstead desires would be a gross miscarriage of justice. This business is her sole source of

income, and splitting it with Tony Holmstead would eliminate her income. He would not receive significant assets in this exchange. The trial court did not abuse its discretion in allowing her to retain an income.

### **3) Tony Holmstead Does Have The Ability To Pay Alimony And Attorneys Fees**

Tony Holmstead attacks the awards of alimony and attorney fees against him as an abuse of discretion. He specifically attacks one finding of the trial court as improper; namely, when it found as excessive and unreasonable a monthly loan payment that he makes. He must show that the trial court clearly abused its discretion to prevail.

Using his own arguments are conclusive proof that this payment was indeed unreasonable and excessive. His numbers, when extrapolated, show that he is paying over 500% interest on this loan, and will repay over \$100,000 on a \$20,000 loan. The trial court ordered him to reduce this payment somehow. There is at least one way to do so, even if it is accepted he cannot refinance or in some other way change the amount. He could treat the loan as a withdrawal from his retirement. Penalties and taxes will not be more than the interest he claims to be paying. Alternatively, if he can refinance the loan (as the evidence shows), then he should do so. The trial court did not abuse its discretion by ordering him to reduce this payment amount.

With regards to attorneys fees, Tony Holmstead again claims that by ordering him to reduce the loan payment was an abuse of discretion. This has been discussed. Additionally, he argues that after the alimony award is considered, he does not have the

funds available to pay the minimal attorneys fees awarded. This is simply incorrect, as he will receive sufficient funds from the sale of property the court ordered to be sold.

**4) If Appellee Cindy Holmstead Prevails, This Court Should Award Her Attorney Fees On Appeal**

Since Cindy Holmstead was awarded attorneys fees below, she asks this Court to award her attorneys fees if she prevails on the appeal.

**ARGUMENT**

Appellant Tony Holmstead broke up his long term marriage with Cindy Holmstead through his infidelity, abusive behavior, and drug addictions. Findings of Fact ¶ 3; Trial Tr. 37-38. He attempted to improperly accumulate enough debt to avoid paying alimony. Findings of Fact, ¶¶ 18, 26. When the divorce was granted, the trial court properly divided property and assigned alimony and attorneys fees in an equitable fashion. Now, Tony Holmstead appeals this equitable decision, as he simply does not want equity to be done. With his appeal, he wants to avoid his marital obligations by denying his spouse any of his property; bankrupting her sole source of income outside alimony; and attempting to reduce his alimony obligations despite making around four times what she does.



## **I. APPELLANT TONY HOLMSTEAD HAS FAILED TO MARSHAL THE EVIDENCE**

Appellant Tony Holmstead attacks the trial court on three separate grounds, most of which are findings of fact by the learned trial court. In order to challenge a trial courts findings of fact, “[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be ‘against the clear weight of the evidence,’ thus making them ‘clearly erroneous.’” In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989)(citations omitted). See also Valcare v. Fitzgerald, 961 P.2d 305, 312 (Utah 1998); Phillips v. Hatfield, 904 P.2d 1108, 1109 n. 1 (Utah Ct. App.1995).

This marshalling Appellant has completely failed to do. Appellant Tony Holmstead has simply recited the findings on point and then highlighted evidence which he argues is contrary to the findings of the learned and thorough trial judge. In essence, he is rearguing his case in this Court, construing all evidence in his favor and largely ignoring the evidence most supportive of the trial courts findings. This Court does “not sit to retry cases submitted on disputed facts.” In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). As this Court stated in Marshall v. Marshall 915 P.2d 508, 516 (Utah Ct. App. 1996), “We will uphold the trial court's findings of fact if a party fails to appropriately marshal all of the evidence.” Therefore, Tony Holmsteads appeal fails on all issues since he has not marshalled the evidence necessary to challenge the trial courts findings.

## **II. THERE ARE EXCEPTIONAL CIRCUMSTANCES JUSTIFYING THE UNEQUAL BUT EQUITABLE DIVISION OF MARITAL PROPERTY.**

Appellant Tony Holmstead main contention on appeal is that the marital property was not divided equally. Appellants Brief, 11-15. In essence, Cindy Holmstead was awarded the marital home and a valueless business; while Tony Holmstead was awarded a greater portion of his retirement plan as his equity in the home. Divorce Decree, ¶¶ 4, 13-14.

### ***A. The 401-K Plan And Marital Home Were Properly Divided***

Appellant Tony Holmstead does not argue that he should have received any portion of the home; he concedes that it was properly given to Appellee Cindy Holmstead. Appellants Brief, 14. Rather, he argues that the trial court either miscalculated or abused its discretion, since the retirement amount awarded to him is not equal to the value of the house. Id.

#### **1) The Trial Court Did Not “Miscalculate”**

The trial court clearly did not miscalculate the amounts. This division is precisely what the trial court desired. In its Denial of Motion to Alter or Amend Judgment, the trial court explicitly stated that “[t]he Court did not make any ‘mathematically incorrect’

finding or misunderstand the value of the home, the home equity loan, the 5<sup>th</sup> wheel or the 401K. They are all correctly stated in the Findings and Decree.” Addendum, Denial of Motion to Alter or Amend Judgment, 1-2. Since there was no calculation error, Appellant Tony Holmstead must show that the trial court abused its discretion in its property order. Trial courts are afforded great latitude in determining property divisions; and changes will be made in its decisions only if there was a clear abuse of discretion that results in a serious inequity. Bradford v. Bradford, 1999 UT App 373, ¶ 25, 993 P.2d 887, 893; Thomas v. Thomas, 1999 UT App 239, ¶ 16, 987 P.2d 603, 609.

## **2) Exceptional Circumstances Justify An Unequal Division Of Marital Property**

Tony Holmstead argues that all property divisions must be equal, unless there are exceptional circumstances detailed by the trial court justifying a different division. Id; see Appellants Brief 11-12; see also Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993) and Burt v. Burt, 779 P.2d 1166 (Utah Ct. App. 1990). While these cases do presume that marital property should be divided equally, “[t]here is no fixed formula upon which to determine a division of properties in a divorce action.” Naranjo v. Naranjo, 751 P.2d 1144, 1146 (Utah Ct.App.1988).

Although Appellant Tony Holmstead argues that property should be split equally, “[t]his presumptive rule of thumb, however, does not supersede the trial court's broad equitable power to distribute marital property, regardless of who holds title.” Bradford v.

Bradford, 1999 UT App 373, ¶ 25. A trial court may divide property unequally when the circumstances and needs of the parties dictate a different approach. Id.

Tony Holmstead argues that the trial court made no specific findings detailing any exceptional circumstances justifying an unequal but equitable decision. Appellants Brief, 14. These findings are required by Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993) and Burt v. Burt, 779 P.2d 1166 (Utah Ct. App. 1990). This is incorrect, however, as there were findings made by the trial court justifying his equitable division of property.

### **3) The Newmeyer Case Mandates Consideration Of Alimony And Income Along With Property To Make An Equitable Division**

The facts of the present case on appeal are similar to the facts in Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987). In Newmeyer, a long term marriage ended, with the wife receiving all of the marital home along with other property. The husband challenged this award, alleging he should have received equal value. The court disagreed, noting that the husband had much higher income potential and that the alimony to the wife was inadequate to support her needs. The court stated:

In determining whether a certain division of property is equitable, neither the trial court nor this Court considers the property division in a vacuum.

The amount of alimony awarded and the relative earning capabilities of the parties are also relevant, because the relative abilities of the spouses to support themselves after the divorce are pertinent to an equitable determination of the division of the fixed assets of the marriage.

Newmeyer, 745 P.2d at 1279 n. 1. Newmeyer is still good law, and its line of reasoning is still very much alive. See this Courts discussion at Bradford v. Bradford, 1999 UT App 373, ¶ 25.

#### **4) The Trial Court Considered Alimony And Income Disparities During Its Property Division**

This reasoning from Newmeyer is squarely on point in the present appeal. The trial court followed Newmeyer by considering the income disparities and alimony needs of the parties. The trial court stated:

The Court equitably divided the assets and liabilities. It did not ‘equalize’ the division of assets.... The Respondent [Tony Holmstead] has the ability to earn many times what the Petitioner [Sindy Holmstead] earns, and in addition, by awarding the house to the Petitioner, the Court reduced the Petitioner’s need for alimony. These were both factors in determining how to equitably divide the assets and liabilities.

Addendum, Denial of Motion to Alter or Amend Judgment, 1. The alimony which Sindy Holmstead was not sufficient for her needs. Id at 2. She had a grossly lower income than Tony Holmstead, less than half of his even after the alimony award had been factored in. (She makes \$1,100 monthly plus \$720 alimony equals \$1,820 monthly income before taxes. He had \$3,631 monthly income after taxes. ) Findings of Fact ¶¶ 24, 26. The marriage had been dissolved because of Tony Holmsteads problems; and he had attempted to cheat on his expenses for alimony purposes. Id at ¶¶ 3, 18. These findings

made by the trial judge are detailed and clearly justify the equitable distribution of the property, rather than a strict formulaic split.

These findings clearly are adequate to justify the trial courts property division with respect to the house and 401-K plan. Although the property awarded was not necessarily equal, it was equitable. This Court should uphold the trial courts equitable division of property.

***B. The Business Property Was Properly Awarded To Cindy Holmstead***

Tony Holmstead also argues that Cindy Holmsteads business, the “Syndicut,” should be liquidated and divided between the two of them. Appellants Brief, 15. This business was awarded exclusively to Cindy Holmstead, and the trial court found that it was worthless. Decree of Divorce, ¶ 4; Findings of Fact, ¶ 7. The trial court strongly advised that the business be liquidated (as Appellant Tony Holmstead now desires), but did not order it to be liquidated, recognizing that it was a source of income to Cindy Holmstead. Id.

Tony Holmstead challenges the finding of the trial court that the “Syndicut” is valueless. Appellants Brief, 14-15. He has failed to marshal the facts. In any case, even if his numbers are to be accepted, the business has a top potential value of \$9,340. Id. He claims that there were unencumbered assets that should be sold and the proceeds divided; specifically the cash in the business checking account. Id.

## **1) Any Money In The Business Was Used For Expenses**

He fails to realize, or address, the trial courts finding that although there were significant sums of money in the business checking account, that money was used for ongoing business expenses, such as tax payments and supply payments. Findings of Fact, ¶ 9(d). If the money in the business checking account were to be divided, then Cindy Holmstead would have to take out a line of credit just to maintain her business. Id. Cindy Holmstead should not be forced to take operating capital of her business; money that is not profit; and give it to Tony Holmstead. She would have to incur substantial debt to maintain her business. In effect, Tony Holmstead is asking this Court to force Cindy Holmstead to take out a loan and give him all proceeds of the loan free and clear, while she must repay the loan. This is clearly inequitable.

## **2) If The Business Was “Equalized,” Cindy Holmstead Would Lose Her Income**

Tony Holmstead further fails to realize that if this business were liquidated, then what little income Cindy Holmstead does have would be severely impacted. The evidence shows that she only makes \$1,100 monthly before alimony. Findings of Fact, ¶ 24. The majority of this income comes from the “Syndicut.” Trial Tr. 53-55. If this business were liquidated, then Cindy Holmstead would only have alimony as income, a paltry amount of \$720 monthly. Tony Holmstead argues that the alimony should be reduced as well. See Appellants Brief, 15-19 and discussion, *infra*, on this argument by Appellant.

### **3) Consequences Of “Equalizing” The Business**

Tony Holmstead argues that the property should be “equalized.” In order to “equalize” the property, this Court would have to:

1. Strip the sole source of income for Appellee Cindy Holmstead;
2. Liquidate her business;
3. Force her to obtain a loan and give the proceeds to Tony Holmstead while remaining responsible for the debt;
4. Once she has done all this, give Tony Holmstead an additional \$4,500 maximum, as this is *his* claimed value of the assets he would receive.

Therefore, for a limited one-time monetary distribution, Tony Holmstead desires this Court to grossly increase the burdens on Cindy Holmstead. This is not equitable by any stretch of the imagination. Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987) allows a trial court to distribute property equitably, not equally, if income will be dramatically affected. This is the case here. The trial court did not abuse its discretion; rather, by awarding the “Syndicut” to Cindy Holmstead it did the only thing it could to maintain her income, even at her low level. Tony Holmsteads appeal on this issue should be denied.

### **III. APPELLANT TONY HOLMSTEAD DOES HAVE THE ABILITY TO PAY ALIMONY AND ATTORNEY FEES.**

Respondent-Appellant Tony Holmstead argues that he does not have the ability to pay the ordered amount of alimony and attorney fees. The trial court awarded Cindy Holmstead \$720 monthly alimony and \$3,500 in attorney fees. Divorce decree ¶¶ 19, 22.



It also explicitly found that Appellant Tony Holmstead had the ability to pay alimony.

Addendum, Denial of Motion to Alter or Amend Judgment, 2. Tony Holmstead argues that the trial court was clearly erroneous and abused its discretion when it found that he had the ability to pay.

### ***A. Standard for Alimony***

There are three factors a court must consider when setting an alimony award. the court must consider first, the needs of the recipient spouse; second, the earning capacity of the recipient spouse and third, the ability of the obligor spouse to provide. Utah Code Ann. § 30-3-5(7); Rehn v. Rehn, 1999 UT App. 41, ¶6, 974 P.2d 306, 310; Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985).

If the trial court has considered these factors, then this Court has stated it will uphold those findings of fact it will not disturb them without evidence of a clear abuse of discretion on the part of the trial court. Schaumburg v. Schaumburg, 875 P.2d 578 (Ut. Ct. App. 1994); Chambers v. Chambers, 840 P.2d 841 (Utah 1992). Utah Rule of Civil Procedure 52(a) also directs that the trial court must be found clearly erroneous in its findings of fact before they can be overturned on appeal.

### ***B. Alimony standard applied***

Appellant Tony Holmstead attacks the trial courts ruling only on the third Rehn factor, that of finding the obligors ability to pay alimony. It is clear that the trial court in this case made proper and complete findings of fact, with an analysis of the obligors (in

this case Tony Holmstead) expenses, income, living expenses and debts, as required by Rehn and Baker v. Baker, 866 P.2d 540, 547 (Utah Ct.App.1993). The court analyzed all parties expenses and incomes. Findings of Fact, ¶¶ 24- 29. Therefore, Appellant Tony Holmstead must show that these findings were clearly erroneous to be successful in his appeal.

Appellant only attacks one finding as clearly erroneous. This is the disallowance by the trial court of his \$618 monthly payment on the 401-K loan as unreasonable and excessive, along with ordering Tony Holmstead to reduce the amount of the monthly payment. Findings of Fact, ¶ 26. This argument is another attempt to reduce or eliminate his alimony. The trial court specifically and in detail found that Tony Holmstead had attempted to increase his expenses in order to reduce the amount of alimony he would be obliged to pay. Findings of Fact ¶ 18; Addendum, Denial of Motion to Alter or Amend Judgment, 2.

### **1) \$618 Monthly Loan Payment Excessive And Unreasonable**

Tony Holmstead alleges that this monthly loan payment expense is entirely reasonable and that there was no evidence he could adjust this payment in any fashion at all. Appellants Brief, 16-19. He claims that of the \$618 monthly payment, \$525 is interest, leaving only a principal payment of \$93 per month. Id.

The trial court found that this payment was unreasonable and excessive. Findings of Fact, ¶ 26. For Respondent/Appellant Tony Holmstead to prevail, the trial court must have clearly erred in describing this payment as unreasonable, and that it could not be

reduced. The trial courts reasoning is quite clear and reasonable as to why this expense was unreasonable and excessive. Id. Rather than restate the learned judges arguments, it is instructive to follow Appellant Tony Holmsteads reasoning to its logical conclusions.

## **2) This Loan Allegedly Had An Interest Rate Over 500%**

Simply by using Tony Holmsteads own numbers which he urges this Court to accept clearly shows that this \$618 monthly payment was indeed unreasonable and excessive. The learned trial judge was entirely correct in his order to reduce the amount paid per month. Taking Tony Holmsteads arguments, he pays \$93 monthly in principal. Appellants brief, 19. To pay the entire amount due of roughly \$19,250 at \$93 per month, it will take about 207 months, or around 17 years.

## **3) This “Reasonable” Loan Requires Repayment Of More Than The Entire Amount Of Appellants Retirement**

He claims to be paying \$525 monthly in interest. Id. Paying \$525 per month for 207 months means that he expects to pay \$108,675 in interest before the loan is repaid. This means that he expects this Court to believe he has an interest rate of over 500% on this loan. (\$108,675 divided by \$19,250 equals over 500%) By extrapolating his numbers, Tony Holmstead is claiming to owe more in interest on this loan than the entire value of his 401-K plan (which had a value of around \$80,000 at the time of trial). Appellants Adden. “H”; Trial Exhibit 28.

While this calculation seems absurd, as a 500% interest rate is definitely usurious, Tony Holmstead seems to argue that we must take this calculation at face value. He insists that we take only the evidence introduced at trial, and if it was not introduced into evidence then it cannot be considered. Appellants Brief, 16-19. Applying this same rule to him, it is clear that the only evidence was that he is paying \$93 a month in principal, and \$525 monthly in interest until the loan is paid in full. It cannot be assumed that these numbers ever vary, as no evidence was introduced to that effect. Therefore, it must be assumed that he indeed is paying 500% total interest and will repay more in interest than the entire value of his retirement.

#### **4) Even One Years Worth Of Payments Are Unreasonable**

Even if his numbers are analyzed for just one year, it must be concluded that the loan payment is excessive and unreasonable. Following his numbers, it is clear he has paid \$4725 in interest from the date of the trial, November 2002, until August 2003 (9 months multiplied by \$525). He therefore has paid about 25% total interest on the loan in about 3/4ths of a year (\$4725 divided by \$19,250 equals around 25%). In fact, he pays a little less than 3% total interest on the loan amount per month, and around 33% interest a year (\$525 divided by \$19,250 is a little less than 3%, and \$525 multiplied by 12 months and then divided by \$19,250 is just about 33%). A yearly interest rate of 33% is also excessive.

**5) Appellants Allege This Extreme Payment Amount Cannot Be Changed**

Regardless of whether this loan payment could be considered reasonable, however, Tony Holmstead argues that the evidence shows that he can do nothing about it. Appellants Brief, 17, 19. He claims he cannot prepay the loan; that he cannot refinance the loan, or borrow money elsewhere and pay off the loan, or adjust the monthly amount due. Id. By ordering him to reduce this \$618 monthly amount, he claims the trial court abused its discretion, when he could not change the amount paid every month. His central argument is that the order to reduce his payment is impossible and cannot be done, and therefore this order was an abuse of discretion.

**6) Appellant Can Reduce The Payment By Treating The Loan As A Withdrawal From The 401-K At Much Lower Penalties And Taxes**

Even if Tony Holmstead cannot change the loan terms, the evidence does show that there is one way he could reduce the payment. He could treat the loan as a withdrawal from his retirement. This option was discussed during testimony. See Appellant Brief Adden. “F”, Trial Trans. 137-38. Tony Holmstead testified he did not wish to take this option, as severe penalties and taxes are assessed against someone who takes an early withdrawal from their 401-K plan. The testimony was that the penalties and taxes would be “huge. Over 25 percent.” Id. If this is true, it would still be advisable to treat the loan as a withdrawal, as the penalties and taxes would be much less than the interest due on this loan, if Tony Holmsteads numbers are used as he urges . A twenty-five percent penalty is much less than paying 500% interest.

By treating the loan as an early withdrawal from his retirement plan, he could still comply with the trial courts order. Doing so would be a better deal for him financially, as he would still save significant amounts of interest, even if he pays the taxes and penalties. The trial court did not abuse his discretion in his order to reduce this payment, as there was at least this one way to reduce this amount entered into testimony.

#### **7) This Usurious Loan Could Be Nullified By Court Order**

Even if the evidence did show that there was absolutely no way Tony Holmstead could reduce this unreasonable loan payment, then the trial court still did not abuse its discretion. When Tony Holmsteads own numbers are used, he should still be ordered to reduce the loan payment, as the loan payment is clearly unreasonable and excessive. If the loan is really that usurious (as using Tony Holmsteads own arguments on appeal suggest), then it is likely illegal as a matter of law. The appropriate remedy would be for the Appellant Tony Holmstead to apply for a court order to nullify or change the loan payment and terms, rather than have his divorce decree modified.

#### **8) Clearly The Trial Court Did Not Abuse Its Discretion By Ordering This Loan Payment Reduced**

It is absurd that any rational man would agree to a 500% interest rate on a loan. Yet, Appellant Tony Holmstead insists that he cannot change his payment and is forced to pay it. He agreed to this loan. Sindy Holmstead should not have her alimony reduced to pay for his absurd loan agreements. It would be contrary to public policy to allow an alimony

award to be subject to such a patently unfair loan. If Tony Holmstead agreed to this loan, then he and he alone should bear its costs. He obviously can afford to pay alimony if he is paying on a loan with terms so absurd as this one.

#### **9) The Real Interest Being Paid Is Far Less Than \$525 Monthly**

Using Tony Holmsteads numbers, as he insists, clearly leads to unreasonable results. If it is assumed that he absolutely cannot be paying that much in interest, then it is obvious that \$525 of his \$618 monthly payment is not all interest. This is most likely true, as an examination of the 401-K loan statement introduced into evidence shows.

Appellants Brief, Adden. Exhibit “H” and Trial Exhib. 28. Although page 2 of the statement shows \$525 paid in interest, the statement itself covers three months: from July 1, 2002 to September 30, 2002. Thus, this interest must be divided by three to see the actual amount of interest paid, or \$175 monthly. This means that instead of only \$93 monthly being paid on principal, \$443 is being paid. (\$618-\$175 equals \$443).

#### **10) Paying \$618 Would Completely Retire The Loan Within Three Years**

A payment of \$618 per month could pay the entire loan off in less than three years. \$618 multiplied by 12 months equals \$7,416 paid on this loan per year. Multiplied by three years, he will have paid \$22,248 in that time span, which is \$2,998 greater than the amount owed. He could have an interest rate of up to 15% on this loan and still completely pay off the loan in three years by paying \$618 monthly. (\$2,998 excess payment divided by total due of \$19,250 is 15%).

## **11) The Trial Court Believed That The Actual Payment Was Only \$308 Monthly**

The court believed that the actual monthly payment amount required on this loan was \$308, not \$618. Findings of Fact, ¶ 26; Trial Tr. 217. See also Appellants Brief Adden. Exhibit “H;” Trial Exhibit 28. Tony Holmstead has not demonstrated that it is not. A payment of \$618 when \$308 is all that was required is clearly excessive, and the Court so found and ordered Tony Holmstead to reduce the payment. Additionally, if Tony Holmstead was overpaying by such a large amount, then clearly there is no penalty to prepay, and there is no reason this loan could not be refinanced as the trial court suggests. Therefore, the trial court did not abuse its discretion.

It is clear that far from being clearly erroneous, the trial courts findings that the loan payment is excessive and unreasonable was entirely correct. There was testimony that there was at least one way the loan payment could be reduced, even if Tony Holmsteads arguments and numbers are accepted. If his numbers are not accepted, then it is clear that he was substantially prepaying on the loan without penalty, and therefore can follow the courts order and reduce the payment amount through refinancing the loan. Appellant Tony Holmstead has simply failed to show how the trial courts findings and order were clearly incorrect and against the clear weight of the evidence, as he must do to show that the trial judge clearly abused its discretion.



## **12) Order Made Bankruptcy Proof To Insure Appellant Would Pay**

### **Alimony**

Appellant Tony Holmsteads other basis for attack on the trial judges findings and order are equally implausible. Tony Holmstead argues that the trial court was so concerned with Tony Holmsteads ability to pay that he made the order bankruptcy proof. Appellants Brief, 17; Findings of Fact ¶ 22. Appellant is simply mistaken. The trial court knew that Tony Holmstead had attempted to game the alimony award with unreasonable expenses. Findings of Fact, ¶26. The record is clear that the order was made bankruptcy proof so that Appellant Tony Holmstead would not attempt to declare bankruptcy and thus end his obligations under the divorce decree. Trans. 216-217.

Additionally, Appellant Tony Holmstead argues that the trial court improperly relied on Tony Holmsteads closing arguments. In essence, counsel for Tony Holmstead suggested potential payment plans for Appellee Sindy Holmstead, which theory the court then applied to Tony Holmstead. Appellant Tony Holmstead claims that this action by the trial court was improper, yet cites no legal authority to prove his point. The court used a line of reasoning suggested by counsel and applied it to the party suggesting it—much like party admissions may be used against them. See, e.g. Utah Rul. Evid. 801(d)(2). Since Appellant cites no legal authority for this point, it should be dismissed. Valcare v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998).

Attacking this finding and order was the only way in which Appellant Tony Holmstead attempted to show that he did not have the ability to pay alimony. As the

preceding discussion shows, his attack fails. The trial courts finding that Tony Holmstead did have the ability to pay alimony must stand. Therefore, the amount of alimony ordered is also correct, and Respondent/Appellant Tony Holmsteads appeal of this issue should be denied.

### ***C. The Standard For Attorneys Fees***

A trial court may award attorneys fees in divorce cases. Utah Code Ann. § 30-3-3. For a court to award attorneys fees, substantially the same factors as an award of alimony must be found. The reasonableness of the desired fees, the need for them to be awarded, and the ability of the other spouse to pay must be considered. Shinokoskey v. Shinokoskey, 2001 UT App. 44, ¶ 18, 19 P.3d 1005, 1010-11.

#### **1) Appellant Tony Holmstead Ordered To Pay Minimal Attorneys Fees**

Appellant Tony Holmstead was ordered to pay \$3,500 towards Appellee Sindy Holmsteads total attorney fees of \$4,500. Findings of Fact ¶ 32, Decree of Divorce ¶ 22. Tony Holmstead appeals this award on the same grounds as he did the alimony award; namely that he does not have the ability to pay attorney's fees. Appellants Brief, 20.

Setting aside the self-evident fact that he obviously can pay his own attorney enough for an appeal, Appellant Tony Holmsteads appeal of this issue should be dismissed as well. He has again failed to marshal the facts. He simply does not marshal any evidence where he might have the ability to pay and then try to distinguish it.

## **2) Order To Reduce \$618 Monthly Loan Payment Reasonable**

Tony Holmstead advances two theories to show he does not have the ability to pay. Id. He first claims that the trial courts order to reduce the \$618 monthly loan expense was unreasonable, as well as another expense the court disallowed (which disallowance is not questioned). Id. These objections have been already dealt with in the preceding discussion on alimony.

Appellants second objection is that after his expenses and alimony payments are taken into account, he has no surplus income with which to pay attorneys fees. Id. This is untrue. Clearly, Tony Holmsteads income is far greater than Sindy Holmsteads.

Findings of Fact ¶ 32. He will be able to recover quicker from the divorce. He has expenses which he could temporarily cut back on, if necessary. These could include entertainment and incidental gifts, etc. See Appellants Brief, Exhibit “E”, Trial Exhibit 18: Affidavit of Monthly Expenses. The testimony was that some of his reasonable expenses were incurred on behalf of his girlfriend; who was the main reason the marriage dissolved. See Findings of Fact ¶ 3; Trial Trans. 170.

## **3) Appellant Does Have Money To Pay Attorneys Fees**

Tony Holmstead does have the current income to pay Appellee’s attorney fees in the amount awarded. The trial court ordered a mountain home or lot sold, and it was stipulated that the proceeds would be split. Decree of Divorce, ¶ 20. The property was stipulated to be worth at least \$25,000 and Appellant Tony Holmstead will receive at least half, or \$12,500. Id.; Trial Trans. 9. When this lot sells, if it has not already, it will

be more than enough to pay Sindy Holmsteads attorneys fees, plus any awarded to her on appeal.

**4) Appellant Tony Holmstead Once Again Is Retrying The Case On Appeal**

Appellant Tony Holmstead claims once again that he does not have the ability to pay an award of the court. He again has failed to marshal the facts supporting the trial courts decision. He ignores any facts supporting the trial court. In essence, he is rearguing the same issues as he did below, hoping for a different result in this Court. His attack on the trial courts award of attorneys fees should be denied, as he simply has failed to show how the court abused its discretion.

**IV. APPELLEE SINDY HOLMSTEAD SHOULD RECEIVE HER ATTORNEYS FEES INCURRED ON APPEAL**

Appellee Sindy Holmstead asks this Court to award her the attorney's fees she has incurred in response to this appeal. This award is proper if she prevails on the substantive merits of this case, as she was awarded attorney fees below. "Generally, when fees in a divorce case are awarded to the prevailing party at the trial court, and that party in turn prevails on appeal, then fees will also be awarded on appeal." Shinokoskey v. Shinokoskey, 2001 UT App. 44, ¶ 20, 19 P.3d 1005, 1011 (quoting Marshall v. Marshall, 915 P.2d 508, 517 (Utah Ct.App.1996)).

## **CONCLUSION**

This Court should uphold the trial courts well-reasoned rulings and findings.

Appellant Tony Holmstead has failed to show that the trial court abused its discretion on any count. He has failed to marshal the facts when attacking the trial courts findings. He argues that the trial court abused its discretion by not “equalizing” the property division. The trial court, knowing that property divisions are not made in a vacuum, properly considered the income disparities and alimony awards of the parties in its division of marital property and should be upheld.

Tony Holmstead argues that he should be granted part of Appellee Cindy Holmstead’s business. He fails to realize that if the Court granted him part of this business, it would eliminate her income, as small as it already is. It would be a gross miscarriage of justice to strip the Appellee of her income in the name of “equality.”

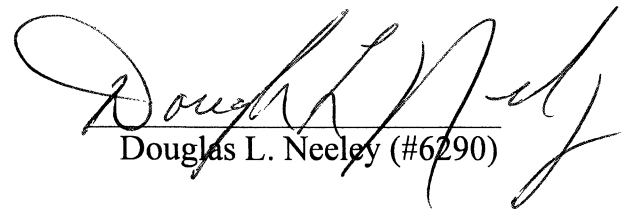
Tony Holmstead argues he does not have the ability to pay the alimony and attorneys fees awarded to Cindy Holmstead by the trial court. He attacks the propriety of the trial courts finding as an unreasonable and excessive expense a monthly loan payment and ordering him to reduce it. Using Appellant Tony Holmsteads own numbers clearly show that this payment was excessive and unreasonable to the point of absurdity.

Alternatively, by looking at the actual evidence, it is clear that the payment could be reduced, it was still unreasonable and excessive, and the trial court did not abuse its discretion in ordering Tony Holmstead to reduce it. The evidence clearly shows that Appellant Tony Holmstead had the ability and funds to pay the small attorney’s fees as

well, and thus the trial court did not abuse its discretion in so ordering him to pay attorneys fee.

Appellee Sindy Holmstead asks for an award of her attorneys fees incurred on appeal, as she was awarded them below and it is clear that Tony Holmstead has failed to show an abuse of discretion by the trial court below. His appeal should be dismissed on all counts and the trial courts well-reasoned findings and order should be upheld.

Dated this 2nd day of September, 2003




Douglas L. Neeley (#6290)

**PROOF OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, postage prepaid, this 2 day of September, 2003, to the following:

Howard Chuntz,  
Attorney for Respondent/Appellant  
1149 West Center Street  
Orem, Utah 84097

A handwritten signature in cursive script, appearing to read "Katrina Lys".

## **ADDENDUM**



SIXTH DISTRICT COURT  
2003 JAN 29 PM 4:03

CLERK

DISTRICT COURT, SEVIER COUNTY, UTAH

895 East 300 North

Richfield

Telephone: 435-896-2700 Fax: 435-896-8047

SINDY HOLMSTEAD,

Plaintiff,

vs.

TONY D. HOLMSTEAD,

Defendant.

**DENIAL OF RESPONDENT'S MOTION  
TO ALTER OR AMEND JUDGMENT**

Case No. 024600016

Assigned Judge: Paul D. Lyman

The Court has reviewed the Respondent's Motion to Alter or Amend Judgment, the Petitioner's Objection to motion to Alter or Amend Judgment, and the Court's ruling issued on November 7, 2002. Based upon the foregoing review the Court enters the following:

The Court equitably divided the assets and liabilities. It did not "equalize" the division of assets. The Findings and Decree as signed accurately reflect the Court's equitable division of the parties' assets and liabilities. The Respondent has the ability to earn many times what the Petitioner earns, and in addition, by awarding the house to the Petitioner, the Court reduced the Petitioner's need for alimony. These were both factors in determining how to equitably divide the assets and liabilities.

The Court did not make any "mathematically incorrect" finding or misunderstand the value of the home, the home equity loan, the 5<sup>th</sup> wheel or the 401K. They are all correctly stated

RULING ON RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT, Case  
number 024600016, Page -2-

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in the Findings and Decree.

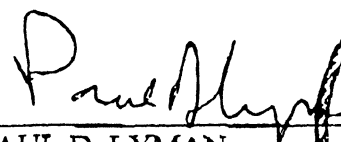
The Respondent asks the Court to reduce the amount of alimony, which is already not sufficient to meet the needs of the Petitioner. In the Respondent's motion he ignores that the Court has found that he took on a \$743.00 per month truck obligation in an attempt to avoid paying alimony. The Respondent needs to sell that truck. In addition, the Court used the Respondent's own suggested payment plan on another debt, to come up with the \$120.00 per month payment on his 401K loan, instead of the \$618.00 per month he is currently paying. The alimony award is reasonable and the Petitioner has sufficient ability to pay it, if he so chooses. If he does not, then he may be found in contempt.

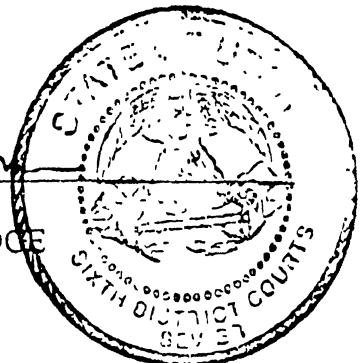
The Court did look at the appropriate factors in determining that the Respondent should pay a portion of the Petitioner's fees. Her need is well established through the disparate earning abilities.

The Court specifically found that the business' losses exceed the value of its assets. The losing business and its assets were awarded to the Petitioner.

Consequently, the Respondent's Motion to Alter or Amend Judgment is denied.



Dated this 29<sup>th</sup> day of January, 2003.

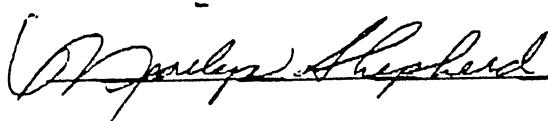
  
PAUL D. LYMAN  
DISTRICT COURT JUDGE



CERTIFICATE OF SERVICE

On January 29, 2003 a copy of the above RULING ON RESPONDENT'S MOTION  
TO ALTER OR AMEND JUDGMENT was sent to each of the following by the method  
indicated:

<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=fax)	<u>Addressee</u>	<u>Method</u> (M=mail, P=in person, F=Fax)
Douglas L. Neeley Attorney at Law 1 <sup>st</sup> South Main, Su 205 P.O. Box 7 Manti, UT 84642		Howard Chuntz Attorney at Law 1149 West Center Street Orem, UT 84057	

  
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## **ADDENDUM II. STATUTORY SECTIONS RELIED ON**

Utah Code Ann. § 30-3-3 Award of costs, attorney and witness fees --Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

Utah Code Ann. § 30-3-5(7)